82-1053

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LILLIAN M. HAAS, Personal Representative of the Estate of and parent and next of kin of John V. Cataldi, deceased; CHERYL RUFF, personal representative of the Estate of and widow of and next of kin of Edwin J. Ruff, Jr., deceased; BETTY LOU SCHLECTIC BAHE, as guardian and next friend of Ginger Schlectic, minor child of Ralph C. Schletic, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS, personal representative of the Estate of and widow of and next of kin of Mark Lamascus, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS as guardian and next friend of Sarah Laine Lamascus and Mark David Lamascus, minor children of Mark Lamascus, deceased,

Appellants,

v.

UNITED TECHNOLOGIES CORPORATION, a Delaware corporation,

Appellee.

On Appeal from the Supreme Court of Delaware

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

(Negatively Stated)

1. DOES NOT THE REQUIREMENT OF "AN IMPARTIAL JURY DRAWN FROM A FAIR CROSS SECTION OF THE COMMUNITY", *THIEL V. SOUTHERN PACIFIC COMPANY*, 328 U.S. 217 (1947) AND *PETERS V. KIFF*, 407 U.S. 493 (1972), APPLY TO STATE CIVIL JURY TRIALS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

2. DOES NOT A STATE STATUTORY "SPECIAL" JURY SELECTION PROCEDURE FACIALLY VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE IT DELIBERATELY EXCLUDES OTHERWISE QUALIFIED JURORS AND THE SPECIAL JURY IS AVAILABLE ON DEMAND IN ANY CIVIL CASE WITHOUT REGARD TO CASE COMPLEXITY?

3. DOES NOT A STATE STATUTORY "SPECIAL" JURY SELECTION PROCEDURE VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE APPLICATION OF THE STATUTE RESULTS IN A JURY POOL THAT DELIBERATELY EXCLUDES PERSONS OVER SEVENTY AND UNDER THIRTY AND WHICH IS DISPROPORTIONATELY DOMINATED BY COLLEGE EDUCATED WHITE MALES?

4. WHERE A STATE COURT FINDS A STATE STATUTORY SPECIAL JURY SELECTION PRO-

CEDURE TO BE ARBITRARY AND POTENTIALLY DISCRIMINATORY, IS NOT THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHERE THAT COURT PROHIBITS FUTURE SPECIAL JURY TRIALS PENDING ADOPTION OF COURT RULE STANDARDS, YET DENIES RELIEF TO THE PARTIES BEFORE IT WHO WERE AFFLICTED BY THE SAME STATUTORY VICES JUSTIFYING PROTECTIVE RELIEF?

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Appellants,

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Appellee.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Delaware, dated August 25, 1982, which appears in the Ap-

pendix hereto, A.1a is reported at 450 A.2d 1173 (Del. 1982).

The previous opinion of the Supreme Court of the State of Delaware dated March 15, 1982, which was superseded by the opinion dated August 25, 1982, is not reported. It appears at A.26a. The opinions rendered by the trial court below, the Superior Court of the State of Delaware, in and for New Castle County, were dated November 26, 1980, and March 17, 1981. These opinions are not reported but appear respectively at A.126a and A.92a.

JURISDICTION

The opinion of the Supreme Court of the State of Delaware upholding the constitutionality of the Delaware special jury statute was rendered on August 25, 1982. A.1a. A motion for rehearing was denied on September 27, 1982, and the mandate isued on the same date. A.51a and A.50a.

A Notice of Appeal to this Court was duly filed in the Supreme Court of the State of Delaware, on December 15, 1982. A.52a.

This appeal is being docketed in this Court within ninety days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATE STATUTES

The Fourteenth Amendment to the Constitution of the United States provides in relevant part as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

10 *Del. C.* §§ 4541-4543:

Subchapter II. Special Juries

§ 4541. Procedure for obtaining, striking and summoning special jury.

(a) A special jury for the trial of a cause, shall be ordered by the Court upon the application of either party.

(b) The party applying for the special jury under this section shall give due notice to the opposite party, and to the Prothonotary, of the time and place of striking such jury. At such time and place the Prothonotary, or his deputy, or if the Prothonotary is not indifferent between the parties, then 2 proper persons indifferent between the parties, appointed by the Superior Court, shall attend with a list of 48 indifferent and judicious citizens of the county, qualified to serve as jurors, showing their names and places of abode.

(c) The party applying for the special jury under this section, his agent or attorney, shall first strike out one of the names, and then the opposite party, his agent or attorney, shall strike out another, and so on, until each shall have struck out 12. If the opposite party, or any person on his behalf, shall not attend, or shall refuse to strike, the Prothonotary or his deputy, or the persons appointed to strike the jury, as the case may be, shall strike for the party not attending, or refusing to strike.

(d) After each party shall have struck 12 names under this section, the remaining 24 persons on the list shall be the jury to be returned for the cause. The Prothonotary, or his deputy, or the persons appointed to strike the jury, as the case may be, shall thereupon deliver to the sheriff a certified list of the names of such persons, with their places of abode, as the jurors to be summoned for the cause, annexed to a venire facias commanding him to summon them.

The sheriff shall, thereupon, summon the persons named, according to the command of the writ, and shall return the list with the venire. (Code 1852, § 2384; Code 1915; § 4274; Code 1935; § 4745; 10 Del. C. 1953, § 4541.)

§ 4542. Impaneling special jury at trial.

At the trial of the cause, a special jury shall be drawn from the list, returned under § 4541 of this title, in the manner provided in this chapter for other cases. In the selection of a special jury, if any of the 24 persons remaining on the list as provided in § 4541 of this title, are unable to sit as jurors, for any reason satisfactory to the Court, the Court may in its discretion limit the challenges by each party to not less than 3. If the panel is reduced, however, to less than 18, the Court shall dismiss the jury, unless the party requesting the special jury waives sufficient of his challenges to permit a jury to be selected. The costs of the special jury so dismissed in such case shall be borne by the party requesting the special jury. (Code 1852, § 2385; Code 1915, § 4275; 35 Del. Laws, c. 226; Code 1935, § 4746; 10 Del. C. 1953, § 4542.)

§ 4543. Expenses.

The party applying for a special jury shall pay the expenses occasioned by the trial of the cause by such special jury, and the same shall not be allowed to him as part of the costs in the case, unless the Court shall, immediately after the trial of the cause, certify upon the record that the cause was proper to be tried by a special jury. The Court, in its discretion, may order payment of the costs of striking and summoning a special jury, or any part thereof, before the trial of the cause wherein such jury is summoned. (Code 1852, § 2386; Code 1915, § 4276; Code 1935, § 4747; 10 Del. C. 1953, § 4543.)

10 *Del. C.* §§ 4501, 4503 and 4506

Subchapter I. Grand and Petit Juries

§ 4501. Declaration of policy.

It is the policy of the State that all litigants in state courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the county wherein the court convenes. It is further the policy of the State that all citizens shall have the opportunity to be considered for service on grand and petit juries in the courts of the State, and shall have an obligation to serve as jurors when summoned for that purpose. (60 Del. Laws, c. 225, § 2.)

§ 4503. Discrimination prohibited.

No citizen shall be excluded from service as a grand or petit juror in the courts of the State on account of race, color, religion, sex, national origin or economic status. (60 Del. Laws, c. 225, § 2.)

§ 4506. Qualifications for jury service.

(a) The President Judge of the Superior Court, or such other Superior Court judge as the plan may provide, on his initiative or upon recommendation of the jury commissioners, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The jury commissioners shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the President Judge of the Superior Court, or such other Superior Court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the Superior Court unless he:

(1) Is not a citizen of the United States 18 years old who has resided for a period of 1 year within the county;

(2) Is unable to read, write, and understand the English language with a degree of proficency sufficient to fill out satisfactorily the juror qualification form;

(3) Is unable to speak the English language.

(4) Is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; provided, however, that no person shall be deemed incapable solely because of loss of sight in any degree; or

(5) Has a charge pending against him for the commission of, or has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than 1 year and his civil rights have not been restored by pardon or amnesty. (60 Del. Laws, c. 225, § 2; 62 Del. Laws, c. 219, § 1.)

STATEMENT OF THE CASE

A. The Underlying Claim

The Appellants are the widows and survivors of four United States servicemen who were killed on January 8, 1975 in the crash of a Sikorsky CH-53 helicopter manufactured by the Appellee. Three of the decedents were Marine Corps crew members on a routine flight from North Carolina to New Jersey, and the fourth, Mr. Lamascus, was a United States Air Force passenger. The crash occurred in the State of Maryland and was the immediate and certain result of the in-flight fracture of one of six main rotary blades on the helicopter. Appellants brought this action for damages against Appellee United Technologies in the Superior Court of the State of Delaware in and for New Castle County.

Appellants contended that the helicopter should have been equipped with an in-flight monitoring device (Cockpit BIM*) that would have warned the pilot and crew of an incipient crack in a main rotary blade. The only warning system on the helicopter was a "visual BIM" on-the-ground monitoring system which Appellants contended was inadequate. The BIM system involved use of nitrogen gas held under pressure in the blades. A crack in the blade permits the release of the gas and a consequent drop in blade pressure, a measurable event. A signaling of this pressure drop during the flight would have given the crew an opportunity to take appropriate maneuvers to land the helicopter prior to a catastrophic in-flight fracture of the blade. The manufacturer, however, failed to include an in-flight monitor.

The manufacturer contended that an on-the-ground monitoring system (visual BIM), which prior to this particular flight advised maintenance crew members of a loss of pressure in the blade, was a sufficient warning system. Plaintiffs' trial evidence was aimed at demonstrating deficiencies in the visual BIM system that caused it to give unreliable indications of blade pressure loss, *i.e.*, false alarms, and thus encouraged a widespread disrespect for the system.

The case was tried in the Delaware trial court to a "special jury" based upon the substantive law of the State of Maryland, which adopts section 402(a) of the Restatement of Torts. *Phipps v. General Motors Corp.*, 363 A.2d 955 (Md. 1976). The manufacturer denied the existence of any product defect and charged contributory negligence and assumption of the risk on the part of deceased crew members in their alleged failure to heed the on-the-ground or visual BIM indication of a loss in blade pressure. The jury returned a verdict for the manufacturer against all

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* "BIM" is an acronym for "Blade Inspection Method."

decedents.[1] On appeal the Delaware Supreme Court first reversed on the ground that the trial court erred in failing to submit the cockpit BIM issue to the jury. A.26a. On reargument before a differently constituted court *en banc*,[2] the court withdrew its first opinion and then affirmed the special jury verdict for the defendant. A.1a.

B. Selection Of The Special Jury And Raising The Federal Question

Following routine discovery, and as the case was prepared for trial, the defense filed an application for a special jury, A.125a, and deposited with the court clerk the required sum of $750. A.91a. Under the law of Delaware, the trial court had no authority or discretion to determine whether a special jury was appropriate. It was legally required to impanel the special jury solely on the defendant's request. 10 *Del. C.* § 4541(a); *Nance v. Rees*, 161 A.2d 795 (Del. 1960).

The Appellants moved to prevent the impaneling of the special jury, A.116a, on the ground, *inter alia*, that the Delaware special jury selection procedure violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution. This motion was denied in an opinion dated November 26, 1980, relying upon this Court's decision in *Fay v. New York*, 332

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[1] Including the passenger Lamascus. The defendant below conceded, and the trial judge so instructed the jury, that the defenses of contributory negligence and assumption of the risk did not apply to him.

[2] After the initial decision dated March 15, 1982, its author, Justice William Duffy, retired. He was replaced by Justice Andrew G. T. Moore, II and the first opinion was "superseded" by an opinion dated August 25, 1982. 450 A.2d 1173. A. 1a. The superseding opinion, unlike the first opinion, erroneously states that the defendant cross-appealed from a denial of its motion for a directed verdict. 450 A.2d at 1174, fn. 1. A. 1a. There was no cross-appeal.

U.S. 261 (1947), which upheld the constitutionality of New York's then special or blue ribbon jury statute and practice, A.126a, and upon *Nance v. Rees*, 161 A.2d 795 (Del. 1960), in which the Delaware Supreme Court upheld the Delaware Special jury.[3]

The Administrator of the court was unable to state with any specificity what criteria were used prior to October 1980 (two months before the trial of this case) to choose names for the selection of the jurors from the special jury panel. A.127a. It is undisputed that the panel was heavily skewed in favor of white, middle-aged, well-educated, economically secure males. A.118a. For instance, only one person in 263 did not have a high school education, 4 percent of the panel was non-white (versus 13 percent for the County), nearly 84 percent had attended college (versus 16 percent for the County), and 34 percent of the panel was female (versus 54 percent for the County). *Ibid.*

The Administrator also stated that the jury commissioners[4] had *purposely excluded* from the jury pool *all persons* having twelve years or less of formal education and being under the age of thirty or over the age of seventy. A.121a. No reason was given nor is known for these eliminations. *Ibid.* Several days before trial, counsel for the parties met in the court clerk's office and participated in the initial "striking" procedure whereby each

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[3] The list of special jurors to be "struck" for this particular case was drawn from a box maintained in the Prothonotary's office consisting of 263 names. A. 121a. The names of potential special jurors which had been placed in this box had been placed there at various times over a long period of years. *Ibid.* Some of these jurors had served on special juries before, and following their service had had their names returned to the box. *Ibid.*

[4] Although the special jury statute, 10 *Del. C.* § 4541, directs that the "Prothonotary, or his deputy" prepare the list of special jurors, the exclusion decisions were made by the jury commissioners who are nowhere mentioned in the statute.

side alternately struck one name from the panel list. In this case the defense exercised its twelve strikes to eliminate twelve female members of the panl.[8]

A defense verdict was rendered by the special jury on January 20, 1981.

C. The Decisions Of The Courts Below

1. *The Trial Court Opinion Upholding The Special Jury Practice*

Following a verdict for the Defendant-Below, Appellee, the Appellants moved for a new trial and renewed the motion that had been made prior to trial alleging, among other things, that it was error to permit the case to be decided by a special jury, that the long-standing special jury practice violated the subsequently enacted (1975) Random Juror Selection Act, 10 *Del. C.* §§ 4501, *et seq.*, and that the Delaware special jury procedure was an unconstitutional anachronism, both on its face and in practice. A.104a. This argument was rejected by the trial court which observed that:

> Although special jurors are in practice selected from among regular jurors who have completed their term of service, they are not selected randomly. Those persons are selected who are considered more suitable for complex civil cases because of their education and

[8] When the trial commenced on December 1, 1980, a twelve-person special jury with six alternates was selected. The decision in this case was rendered by a jury that was 84 percent male, consisting of 10 men and 2 women. Of the 10 men, one was retired, one was self-employed, and the remaining eight were employed by large corporations. Of the women, one lady was retired, and one was employed as a bookkeeper. The jurors ranged in age from 38 to 70, with seven of them in their 50's. The juror who was aged 70 had had her name placed in the special jury box prior to October, 1980. There were four other jurors whose names had been placed in the special jury box prior to October, 1980, who were under the age of 30; however, they were either stricken or excused for cause prior to the time this special jury was impaneled.

> experience. Thus, by definition the general level of education and experience of special jurors is expected to differ from that of regular jurors or the population at large. This is the purpose of special juries. A.102a.

However, there is no evidence of record to support these observations regarding the suitability of the special jurors or the purported purpose of the special jury selection system. Nor is there any statutory or judicial limitation on the use of special juries for only "complex civil cases". *Nance v. Rees*, 161 A.2d 795 (Del. 1960).

In ruling upon the Appellants' motion for a new trial, the Delaware Superior Court expressly held that the Delaware Random Juror Selection Act, 10 *Del. C.* §§ 4501, *et seq.*, which was adopted in 1975,[6] did not apply to special jurors. A.102a. No reason was given for this decision. The trial judge also relied upon this Court's decision in *Fay v. New York*, 332 U.S. 261 (1947), and a Delaware state court case decided twenty years before, *Nance v. Rees*, 161 A.2d 795 (Del. 1960), which had upheld the constitutionality of the Delaware special jury statute but had labeled those juries "defendants' juries" and had urged the Delaware legislature to abolish the Delaware special jury system. The absurd rationale of the 1960 decision was: "Plaintiffs (in an automobile accident case) argued that the practice is violative of due process under the 14th Amendment of the Federal Constitution,

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[6] This statute was patterned after the "Jury Selection and Service Act of 1968," 28 *U.S.C.* §§ 1861, *et seq.*, which has as its major goal securing the random selection of juries from a fair cross-section of the community. *United States v. Maskeny*, 609 F.2d 183 (5th Cir. 1980), *cert. den.*, 447 U.S. 921 (1980), *reh. den.*, 448 U.S. 912 (1980). *United States v. Potter*, 552 F.2d 901 (10th Cir. 1977) announced that this Act establishes "as a national policy the right of all litigants to have grand (and, of course, trial) juries selected at random from a fair cross-section of the local community." 552 F.2d at 902. The 1975 Delaware statute traces, almost verbatim, the 1968 Federal Act. It appears in full at A. 132a-144a.

but we think not. Since the practice long antedates the Revolution, it cannot be inconsistent with due process of law. *Ownbey v. Morgan*, 256 U.S. 94, . . ." 161 A.2d at 799.

2. *The Delaware Supreme Court Opinions In The Case At Bar*

The Delaware Supreme Court dealt with these questions by tracing the history of special juries and then first upholding the constitutionality on its face of the Delaware special jury statute.

> The special jury as an institution is ensconced in Delaware law and is not constitutionally infirm. A.19a.

The Court then went on, however, to condemn the potential of the special jury statute for discrimination and issued a directive requiring the Superior Court to develop criteria in the future that would provide for the purported fair selection of future special juries, suggesting persons who meet "specified age, intelligence, and educational requirements" and possessing "special occupational skills." A.24a. Despite that, the Delaware Supreme Court failed to grant relief to the parties before it and declined to reverse the verdict that was renderd in this particular case.[7]

After reviewing this Court's decisions in *Moore v. New York*, 333 U.S. 565 (1948); *Fay v. New York*, 332 U.S. 261 (1947); *Brown v. New Jersey*, 175 U.S. 172 (1899), the Delaware Supreme Court sustained the constitution-

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[7] This case had an unusual history in the Delaware Supreme Court. It was first argued before a three-justice panel in October 1981. It was then argued before the *en banc* court composed of four justices in January 1982 and that bench rendered the unanimous March 15, 1982 opinion. Thereafter, reargument was granted and the writing justice retired; the case was reargued before a four-justice bench with three of the justices still presiding and this resulted in the unanimous August 1982 opinion authored by a different justice.

ality of the Delaware special jury statute on the following basis:

> The [United States] Supreme Court has not yet reviewed the constitutionality of a special jury statute in a *civil* setting. The one Supreme Court case dealing specifically with a challenge to a civil jury did not involve a blue ribbon jury and was decided not on constitutional grounds but upon the supervisory power of the court over the administration of justice in the Federal system. *Thiel v. Southern Pacific Company*, 328 U.S. 217 (1946)

(Emphasis in original). A.20a.

The Delaware Supreme Court further held that "it is not clear that the same Due Process and Equal Protection standards applicable to jury selection in a criminal trial would be applicable in a civil trial." A.21a.

Appellants moved for reargument on September 9, 1982. Renewing earlier arguments, Appellants contended that for the Court to conclude that the Delaware special jury practice was so arbitrary and potentially discrimianatory that no future litigant should be exposed to it in its present form yet to deny relief to the litigants before it who were victimized by that practice, was a denial of equal protection. A.56a. This motion was summarily denied. A.51a.

THE QUESTIONS ARE SUBSTANTIAL

I. The Questions Presented

This case presents questions which go to the heart of the fair administration of justice in this country. The questions involve whether the states are constitutionally obliged to provide in civil jury cases "an impartial jury drawn from a fair cross section of the community" (*Theil v. Southern Pacific Company*, 328 U.S. 217 (1946) as is required in all federal jury trials and in state criminal trials (*Peters v .Kiff*, 407 U.S. 493, 501 (1972)); and involve also the constitutional limitations upon the power

of a state court to deny relief to litigants exposed to constitutionally infirm jury selection procedures. Those questions, which have not been but should be decided by this Court, arise against the backdrop set forth below.

The Delaware Special Jury Statute (10 *Del. C.* §§ 4541-4543) makes a "special jury" available by right in any civil case. All that is required is a demand for a "special jury" and the payment of a $750 fee, and there are no statutory restrictions upon the availability of the special jury based upon the nature or complexity of the case. Nor does the statute provide any criteria or guidelines for the selection of the special jurors comprising the jury pool. The selection is left up to the unfettered discretion of court clerks. As a result there is no statutory mechanism to assure that the jurors comprising the so-called special jury pool represent a fair cross section of the community.

The first question posed is whether the requirement of "an impartial jury drawn from a fair cross section of the community" articulated in *Thiel v. Southern Pacific Company*, 328 U.S. 217 (1946) and *Peters v. Kiff*, 407 U.S. 493, 505 (1970) is applicable to state civil jury trials. The second question is whether the Delaware statute is facially repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it is available on demand without regard to case complexity and because it deliberately excludes otherwise qualified jurors from the special jury pool.

As applied in this case, the Delaware "special jury" statute resulted in the selection of a special jury pool from which all persons under thirty and over seventy were intentionally excluded and which was skewed grossly disproportionately in favor of middle-aged, college educated white males. The third question thus becomes whether a state is constitutionally permitted under the Due Process and Equal Protection Clauses to subject litigants to a civil jury drawn from a pool thus biased.

Appellants challenged the constitutionality of the "special jury" statute on the foregoing grounds in the state courts below. On appeal the Delaware Supreme Court found that the Delaware statutory special jury selection procedure was "arbitrary" and "potentially discriminatory," with representation of women statistically "suspect" and on that basis prospectively ordered that no "special jury" trials would take place pending adoption of lower court rules providing standards for future special jury selection.[8] However, the Delaware Supreme Court refused to grant relief to these Appellants who were before that court, even though Appellants had been victimized by the same statutory vices which had impelled the Delaware court to grant prospective relief.

The final question is whether the Fourteeth Amendment compels a state court to grant relief to the parties before it under those circumstances.

These question are substantial because the Delaware Supreme Court has decided important questions of federal constitutional law which have not been, but should be, settled by this Court and has decided them in a way that departs from the constitutional norm for jury selection. The questions have ramifications beyond the significant rights of these plaintiffs, because they present fundamental questions concerning the role of the civil jury in a democracy.

II. Substantiality Of The Questions

A.

The first two questions are substantial and merit review by this Court. While a state is free to modify or even to abolish jury trials in civil actions altogether,

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[8] The criteria suggested by the Delaware Supreme Court for selection of special jurors are themselves constitutionally impermissible because they contemplate exclusion of otherwise qualified jurors based solely on age, occupation, intelligence and education (minimum of college degree).

Palko v. Connecticut, 302 U.S. 319, 324 (1937), where a right to a jury trial is afforded the Fourteenth Amendment requires "a fair trial in a fair tribunal" and forbids creation of a system which violates the fundamental rights and interests of the litigants. *Peters v. Kiff*, 407 U.S. 493, 501 (1972) (regardless of the form of proceedings, due process requires impartiality and basic fairness). *Walker v. Sauvinet*, 92 U.S. 90 (1876); *Maxwell v. Dow*, 176 U.S. 581, 605 (1900); *Carter v. Jury Commissioners of Greene County*, 396 U.S. 320 (1970). The right to a fair and impartial tribunal guaranteed by the Fourteenth Amendment is fundamental. *Peters*, 407 U.S. at 501; *In re Murchison*, 349 U.S. 133, 136 (1955); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (administrative hearing); *Tumey v. Ohio*, 273 U.S. 510 (1927) (bench trial).

With respect to jury trials, this Court has recognized that the American tradition of trial by jury demands and necessarily contemplates an impartial jury drawn from a jury pool which, at least, presents a possibility for a representative fair cross section of the community. *Peters*, 407 U.S. at 500. *Thiel v. Southern Pacific Company*, 328 U.S. 217, 220 (1946). *See also Smith v. Texas*, 311 U.S. 128, 130 (1940) (Fourteenth Amendment); *Strauder v. West Virginia*, 100 U.S. 303, 308-9 (1880) (Fourteenth Amendment). And, in *City of Mobile v. Bolden*, 446 U.S. 55, 77 (1980), n. 24, this Court noted that "There is a constitutional right to a system that is not purposefully exclusionary."

On its face the Delaware special jury statute does not pass constitutional muster. First, by definition, a state "special jury" statute excludes otherwise qualified jurors from service, thus rendering impossible compliance with the constitutional mandate that the jury pool be fairly drawn from a cross section of the community. Such a statute also *per se* violates the constitutional mandate that the system not be "purposefully exclusionary." Second, even if the selection of individuals based on alleged

"special competence" to decide certain types of civil cases were constitutionally acceptable, the statute must nonetheless demonstrate, at a minimum, a rational connection between the alleged "special competence" and the type of civil action to be decided.[9] No such purpose can be ascribed to the Delaware statute, because it is available on demand without regard to the type or complexity of the civil action.[10] 10 *Del. C.* § 4541. *Nance v. Rees*, 161 A.2d 795 (Del. 1960); *Robelen Piano Company v. DiFonzo*, 172 A.2d 568 (Del. 1961). Third, the statute fails to specify any criteria or qualifications to become a special juror, or any procedural safeguards to assure that the "special jurors" are drawn at random from a cross section of the cognizable groups in the community.

The first two questions involve the most fundamental democratic values and their application to the administration of justice. If the "special jury" system results in "defendants' juries" (*Nance v. Rees*, 61 A.2d 795 (Del.

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[9] Where there is a fundamental right or interest, a state must demonstrate a compelling interest to uphold a statute depriving a citizen of that right and must specifically tailor the statute to further the statutory purpose. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972) (right to vote). Such a statute will be strictly scrutinized to determine if the proper showing has been made. *Id.* At the very least, there must be some rational relation between the substance of the statute and its purpose. *Turner v. Fouche*, 396 U.S. 346, 362 (1970); *Reed v. Reed*, 404 U.S. 71 (1971); *Stanton v. Stanton*, 421 U.S. 7 (1975).

[10] No other state has an "on demand" special jury. Instead, in each of the other three states with special juries applicable to civil cases, New Jersey, N.J. Ann. § 2A:75-1 (West); Virginia, Va. Code § 8.01-362; West Virginia, W. Va. Code § 56-6-13, use of the special jury is discretionary with the trial court upon a showing of the need for such a jury. Thus, if the strict scrutiny standard of review is applied the statute clearly falls. And, even if the traditional "rational relation" standard is applied the statute still does not measure up since there is no rational reason for allowing a "special" jury for any and all cases without regard to their nature or complexity.

1960)) and has become an "instrument of the economically and socially privileged" (*Thiel*, 328 U.S. at 224)), then how can that practice be comparable with basic principles of democratic self government? And if such a practice can be constitutionaly reconciled with democratic values, then on what basis? If the rationale for special juries is that they are necessary in complex cases not capable of resolution by average jurors, see Luneburg and Nordenberg, *Specially Qualified Jurors and Expert Non-Jury Tribunals: Alternatives for Coping with the Complexities of Modern Litigation*, 67 Va.L.Rev. 887 1981),[11] Note, *The Case for Special Jurors in Complex Civil Litigation*, 89 Yale L.J. 1155 (1980), then how can a statute such as Delaware's survive even under the traditional "rational relation" review standard, where it is available in any case on demand?

The first two questions merit review by this Court for a second reason. This Court last addressed the constitutionality of a special jury statute 35 years ago in *Fay v. New York*, 332 U.S. 261 (1947) where it upheld the New York special jury statute. Since then, more recent pronouncements of this Court have severely eroded the constitutional rationale of the *Fay* decision. *Taylor v. Louisiana*, 419 U.S. 552 (1975), *Duren v. Missouri*, 439 U.S. 357 (1979) (exclusion of women from jury panels), *Peters v. Kiff*, 407 U.S. 493 (1972) (standing to raise exclusion of cognizable groups). Even the Delaware Supreme Court has characterized the *Fay* decision as "questionable". A.21a. To the extent that *Fay* were thought to be controlling in this case—and it is not[12]—this Court should address frontally the issue of whether *Fay* remains viable.

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[11] *See also* 65 *Judicature*, Nos. 8-9 (March-April 1982) and *In Re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980).

[12] *Fay*, which acknowledged that a "dual system of juries prevents easy possibilities of violation of the Fourteenth Amendment," 332 U.S. at 265, is distinguishable from this case because the

B.

The third question merits review by this Court because even if there is a place in the American system of justice for special juries, the Delaware special jury system, as it is practiced, is constitutionally intolerable and must be eradicated. In this case there was deliberate exclusion of otherwise qualified young (under 30) [13] and old (over 70) jurors from the jury panel. A.121a. The panel was totally dominated (84%), A.118a, by college educated persons, with gross disproportion of males and whites, A.118a. No single one of these exclusions or disproportions is compatible with present day constitutional norms for jury selection. *Peters, supra; Thiel, supra; Brown v. Allen*, 344 U.S. 443, 474 (1953); *Turner v. Fouche*, 396 U.S. 346 (1970); *Castaneda v. Partida*, 430 U.S. 482 (1977). If this practice is countenanced by permitting the Delaware Supreme Court decision to escape constitutional review (or by allowing it to stand), then this shocking departure from standards of fundamental procedural fairness will remain the last word on the minimum protections states are required to afford litigants in civil jury trials.

C.

The fourth question challenges, under the Equal Protection Clause, the power of a state court to deny relief to litigants exposed to constitutionally infirm jury selection procedures. This question is substantial because at stake is the very integrity of both the fact finding and judicial review processes.

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special jury there was available only after a determination by the trial judge in his "sound discretion that it was appropriate to the case." *Id.* at 268-69.

[13] The First, Fifth and Seventh Circuits have found young adults to constitute cognizable groups in the community. *United States v. Butera*, 420 F.2d 564, 571 (1st Cir. 1970); *Ciudadanos Unidos De San Juan v. Hidalgo County*, 622 F.2d 807, 819 (5th Cir. 1980); *Chase v. United States*, 468 F.2d 141, 146 (7th Cir. 1972).

In prior cases the Delaware Supreme Court had recognized that the Delaware special jury system resulted in "defendants' juries". *Nance v. Rees*, 161 A.2d 795, 798 (Del. 1960); *Robelen Piano Co. v. DiFonzo*, 172 A.2d 568, 571 (Del. 1961). In this case the Delaware Supreme Court found that the special jury system was so "arbitrary", A.24a., "potentially discriminatory", A.24a., and with the representation of women so statistically "suspect", A.22a., that it barred the impaneling of future special juries pending lower court promulgation of rules for selection of special jurors. By so doing the Delaware Supreme Court recognized the necessity of affording relief to future litigants, which was tantamount to acknowledging a violation of constitutional principles in this case. Yet the court refused to grant that same relief to the parties before it whose efforts benefited future litigants and who had been equally victimized by the infirmities of the special jury selection procedure. Since "[i]t is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted . . .," *Marbury v. Madison*, 1 Cranch 137, 175 (1803), the court must articulate some legitimate basis for denying these litigants relief. On what constitutional basis, and under what principle of fairness should an appellate court be permitted to discriminate against litigants in that fashion?

While this Court has held that in certain instances purely prospective relief may be appropriate, *Linkletter v. Walker*, 381 U.S. 618, 622 (1967), this Court has been careful to articulate the reasons for prospective application. *Stovall v. Denno*, 388 U.S. 293, 297 (1967). And, where, as here, the constitutional defect found went to the integrity of the fact-finding process, this Court has customarily granted relief to the parties before it. *Jackson v. Denno*, 378 U.S. 368 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

In the case at bar the Court inexplicably confined the granting of relief to unknown future litigants. And even

the relief granted them falls far short of constitutional standards. The criteria the Delaware Supreme Court has directed the trial courts to use in promulgation of special jury rules will perpetuate the unconstitutional exclusion of otherwise qualified jurors from on-demand special juries. These unacceptable criteria—age, occupation, and education (minimum requirement of college degree)—will surely result in another attack on the constitutionality of the Delaware system.

Only this Court can now rectify the unusual efforts of the Delaware court to deny relief to these litigants and simultaneously preserve an outmoded and unfair civil jury process by asserting the supremacy of federal constitutional mandates over a fundamentally unfair state civil jury process.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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